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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PATRICK PRESTON, Petitioner, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent;	D070315 (San Diego County Super. Ct. No. 37-2015-00021751-CU-WT-NC)
CITY OF CARLSBAD, Real Party in Interest.	

ORIGINAL PROCEEDINGS in mandate. Robert P. Dahlquist, Judge. Petition granted.

James C. Mitchell for Petitioner.

No appearance for Respondent.

Daley & Heft, Lee H. Roistacher, Mitchell D. Dean, Heather E. Paradis; Celia A. Brewer, City Attorney, and Paul G. Edmonson, Assistant City Attorney for Real Party in

Interest.

In this case, we grant petitioner Patrick Preston extraordinary relief and direct that respondent trial court vacate its order sustaining without leave a demurrer to Preston's tort claim against his former employer, real party in interest City of Carlsbad (the city). As we explain more fully below, this record does not show as a matter of law that the claim Preston filed with the city was untimely.

FACTUAL AND PROCEDURAL HISTORY

Until November 2013, Preston had been a police officer employed by the city. By way of an amended complaint, Preston has made two general claims: first, Preston alleged he was wrongfully terminated based on a hearing disability; second, and at issue in this proceeding, Preston alleged that in July 2014 after he left the city and found new employment, the city's police chief wrote a derogatory letter to his new employer, the San Diego County Sheriff (the sheriff). Preston alleged the letter contained information falsely accusing him of conduct unbecoming of a law enforcement officer. Preston's complaint further alleged that in October 2014, as a result of the accusations in the police chief's letter, the sheriff launched an internal affairs investigation of Preston. Preston alleged that the chief's letter gives rise to separate causes of action for violation of Labor Code section 1050 (third cause of action), intentional interference with economic advantage and interference with contractual relations (fourth and fifth causes of action).

Of some import, Preston's amended complaint alleges that, on January 30, 2015, prior to filing a complaint against the city, Preston filed a claim with the city, and that, on February 2, 2015, the city returned his claim as untimely.

The city filed a demurrer to the statutory and tort claims alleged in the amended

complaint, and the trial court sustained the demurrer without leave to amend and dismissed Preston's third, fourth, and fifth causes of action. In particular, the trial court found that after the city returned his claim as untimely, Preston was obligated to seek leave from the city to file a late claim.

Preston filed a petition for a writ of mandate in this court, and, after receiving an informal response from the city, we issued an order to show cause.

I

Because the trial court's order effectively split Preston's lawsuit, with the wrongful termination claims proceeding to trial and the remaining claims dismissed without leave to amend, writ review is warranted at this stage. When an order sustaining a demurrer as to some but not all causes of action "has deprived a party of an opportunity to plead a substantial portion of the case," writ relief is warranted to prevent "a needless trial and reversal." (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1223.)

II

Preston does not dispute that his statutory and tort claims are subject to the claims statutes. (See Gov. Code,[1] §§ 901, 911.2). If a governmental agency believes a claim is not timely, it may return the claim by sending a specified notice to the claimant. (§ 911.3.) The notice states the claimant may apply to the entity for leave to file a late claim. (§ 911.4.) Here, the city sent such a notice, but Preston did not apply for leave to file a late claim; instead, because he believed his claim was timely, he filed the instant lawsuit.

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1 Unless otherwise indicated, all further statutory references are to the Government Code.

Contrary to the trial court's ruling, we have found no case which requires that when a claim has been returned as untimely, instead of filing a lawsuit, a claimant must first seek leave from the agency to file a late claim. Rather, the cases have, on a fairly uniform basis, held that when an entity returns a claim as untimely and the claimant disputes that finding, the claimant may deem that to be a rejection of the claim and file a lawsuit alleging timely compliance with the Tort Claims Act. (See, e.g., *Rason v. Santa Barbara City Housing Authority* (1988) 201 Cal.App.3d 817, 827-828; *Toscano v. County of Los Angeles* (1979) 92 Cal.App.3d 775, 783; *Mandjik v. Eden Township Hospital Dist.* (1992) 4 Cal.App.4th 1488, 1498-1499; *Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702, 711-712.)

Thus, the trial court erred in sustaining the city's demurrer on the grounds that Preston was required to apply for leave to file a late claim.

III

With respect to the timeliness of Preston's claim, contrary to the city's argument, we cannot resolve that issue on this record as a matter of law. As it did in the trial court, the city asks that we take judicial notice of the date of the police chief's letter to the sheriff. The trial court did not rule on the city's request for judicial notice of the letter, and we deny the request the city has made here.

As the city notes, under section 911.2, subdivision (a), Preston had six months from the date his claims accrued in which to file his claim with the city. The face of the chief's letter indicates that it was written on July 16, 2014. The city argues that the date on the letter establishes as a matter of law that Preston's tort claims accrued on that date and that, if we take judicial notice of the letter, the record will thereby establish that

Preston's January 30, 2015 claim was untimely as a matter of law. The city also relies on the fact that the claim Preston filed with the city stated that the chief's letter was sent in early July 2014, although his amended complaint alleged that the offending letter was delivered sometime after June 29, 2014. These arguments do not establish that Preston's claim was untimely.

First, damage is an element of each of Preston's three tort causes of action: violation of Labor Code section 1050 gives rise to civil liability *for damages* under Labor Code section 1054, and intentional interference with economic advantage and interference with contractual relations each require a showing of damage. (See *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55; *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 514, fn. 5.) When, as here, damages are an element of a cause of action, the cause of action does not accrue until those damages have been sustained. (*City of Vista v. Robert Thomas Securities, Inc.* (2000) 84 Cal.App.4th 882, 886.) " 'Mere threat of future harm, not yet realized, is not enough.' " (*Ibid*.) Thus, the critical question here is not the date of the chief's letter but the date the letter was actually received by the sheriff; plainly, the letter could do *no* harm until it was received by the sheriff.

Second, neither the letter offered by the city, nor the claim Preston filed, establish either the date the letter was sent or, more importantly, the date it was received. This would be the case, even if we were willing to take notice of the letter the city has offered. Although we could take judicial notice of the existence, content, and authenticity of the letter, doing so would not establish the truth of factual matters asserted in the letter. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063.) Although "courts

may notice official acts and public records, 'we do not take judicial notice of the truth of all matters stated therein.' [Citations.] '[T]he taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom, since in many instances what is being noticed, and thereby established, is no more than the existence of such acts and not, without supporting evidence, what might factually be associated with or flow therefrom.' " (*Id*. at pp. 1063–1064; accord, *People v. Castillo* (2010) 49 Cal.4th 145, 157.)

In sum, even if we took judicial notice of the chief's letter, it would not establish when Preston's tort claims accrued and, hence, whether his claim was untimely. Because the letter will not assist in resolution of Preston's petition, we decline to take notice of it.

Much the same is true with respect to the claim Preston filed with the city: its allegation that the letter was sent in early July 2014 does not establish when the letter was sent or when it was received and, of course, is contradicted by the face of the city's letter itself, which shows that, at the earliest, it was sent in the last half of July 2014.

If, in further proceedings in the trial court, by way of discovery or other means, the city is able to establish when the sheriff received the chief's letter, it may again tender its timeliness argument in the trial court and respond to Preston's contention that he was not harmed until October 2014, when the internal affairs investigation commenced. However, at this stage, the record does not permit us to determine as a matter of law

when Preston's claims accrued and, hence, when the claims statute commenced.[2]

DISPOSITION

Let a peremptory writ of mandate issue commanding the trial court to vacate its order sustaining the city's demurrer to Preston's third, fourth, and fifth causes of action and enter an order overruling the demurrer. Preston shall recover the costs he incurred in this writ proceeding.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

IRION, J.

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2 We do not reach the city's alternative contentions with respect to the merits of Preston's tort claims; these contentions were not raised in the trial court and are not suitable for review in this extraordinary proceeding.